IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON ,	)	**No. 23955-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
EUGENE P. EISENHART,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

SWEENEY, C.J.—Eugene Eisenhart appeals his convictions for four counts of delivery of a controlled substance and two counts of possession of a controlled substance with intent to deliver. He contends that controlled buys are not evidence of intent to deliver, the unanimity instruction given to his jury was defective, and his standard range sentence was excessive under the multiple offense doctrine. We find no error and affirm.

FACTS

Eugene P. Eisenhart was convicted of four counts of delivery of a controlled substance and two counts of possession of a controlled substance with intent to deliver, contrary to RCW 69.50.401(1).

Investigators conducted three separate controlled buys followed by a search of Mr. Eisenhart's home. They found prescription bottles containing Oxycontin and empty Oxycontin and Hydrocodone bottles in Mr. Eisenhart's name. Paraphernalia including scales, pipes, razor blades, and cut up drinking straws were also found.

At his jury trial, Mr. Eisenhart claimed he was prescribed the drugs legally and denied selling them.

The defense proposed a jury instruction charging the jurors to discuss the case and change their opinion if convinced it is wrong, but not to "change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict." Clerk's Papers at 34. The court did not give this instruction.

The jury did receive the following "unanimity" instruction: "Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision." 3 Report of Proceedings (3RP) at 251. The jurors were polled and each affirmed that the verdict was his or her own.

DISCUSSION

Sufficiency of Evidence – Delivery

Mr. Eisenhart first challenges the sufficiency of the evidence that he intended to

deliver the drugs in his possession.

We will affirm a jury verdict if, assuming the jury accepted the truth of the State's evidence, it could have found beyond a reasonable doubt the facts constituting the essential elements of the crime. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

To prove intent to deliver drugs, at least one additional factor besides possession must be present. *State v. Brown*, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). Here, the evidence included the additional factors of scales and other delivery paraphernalia, as well as actual sales.

Mr. Eisenhart contends that prior sales are not evidence of intent to deliver the substances found in the search. The State must prove instead, he argues, independent intent to deliver the actual drugs found. Mr. Eisenhart cites to *State v. Goodman*, 150 Wn.2d 774, 83 P.3d 410 (2004). That case holds that the information must name the specific substance—whether methamphetamine or cocaine, for example. *Id.* at 787. But *Goodman* does not suggest that possession of drugs and delivery paraphernalia plus a series of recent sales of the same type of drug is not enough to support a conviction for possession with intent to deliver.

We also disagree with his further contention that intent to deliver cannot coexist with evidence of personal use by the defendant. The jury may make reasonable

inferences from the evidence. *Salinas*, 119 Wn.2d at 201. Here, the jury could reasonably infer from the evidence that delivery was one reason Mr. Eisenhart possessed these drugs. And, of course, controlled buys by law enforcement are evidence of the intent to sell.

The evidence was sufficient to support a verdict of guilty of intent to deliver.

Unanimity Instruction

Mr. Eisenhart next contends that his proposed instruction, WPIC[1] 1.04, must be given in every case. It instructs each juror to vote according to his or her true belief, even if this means failing to achieve unanimity. Mr. Eisenhart contends that the unanimity instruction was a poor substitution and that the phrase "you must agree" could be understood as a command to consent to the majority verdict. Mr. Eisenhart contends the error was not cured by polling the jury because each juror would say the final verdict was his or her verdict, even if that juror had switched his vote to achieve unanimity.

The State responds that Mr. Eisenhart has not provided an adequate record for review, and did not preserve this error for appeal—including an instruction in the defense instruction package does not mean counsel actually requested it. Proposed instructions can be withdrawn. Moreover, the State contends, even if defective, the instruction was harmless, because there is no question what the jury determined and any defect was cured

[1] 11 Washington Pattern Jury Instructions: Criminal (2d ed. 1994) (WPIC).

by polling.

We review de novo if the trial court's decision to reject a jury instruction is based upon the law. *State v. Walker*, 136 Wn.2d 767, 772, 966 P.2d 883 (1998). If the ruling is based on a factual dispute, we review it only for abuse of discretion. *Id.* at 771-72. Here, we have no record of the basis for the court's rulings on jury instructions. Either way, the instructions given here were not erroneous.

Juries must be instructed to reach a unanimous verdict in which each juror makes up his or her own mind. *State v. Goldberg*, 149 Wn.2d 888, 892, 72 P.3d 1083 (2003). A unanimity instruction is not optional in criminal cases. *State v. Badda*, 63 Wn.2d 176, 182-83, 385 P.2d 859 (1963).

WPIC 1.04 is not a unanimity instruction. It instructs the jury to consult with each other and be open to other views. This instruction is optional. *State v. Watkins*, 99 Wn.2d 166, 174-75, 660 P.2d 1117 (1983). Its purpose is to avoid deadlock, not to encourage jurors to compromise their honest beliefs. The court may not give any instruction that might persuade reluctant jurors to "compromise with their consciences and yield to the majority for the mere purpose of agreement." *State v. Ring*, 52 Wn.2d 423, 428, 325 P.2d 730 (1958); *Watkins*, 99 Wn.2d at 175; *State v. Boogaard*, 90 Wn.2d 733, 737, 585 P.2d 789 (1978).

Instructions that comport with CrR 6.15(f)(2) are fine, so long as they permit each

juror to reach a verdict "uninfluenced by factors outside the evidence, the court's proper instructions, and the arguments of counsel." *Boogaard*, 90 Wn.2d at 736; *Watkins*, 99 Wn.2d at 176. The court's comments shall not coerce jurors to change their position. *Boogaard*, 90 Wn.2d at 736.

The court instructed this jury that "each of you must agree for you to return a verdict." 3RP at 251. This is a unanimity instruction. "You must agree" is a condition for arriving at a verdict. It explains what a true verdict is. It does not instruct jurors to "abandon conscientiously held opinions" in favor of the defense. *Watkins*, 99 Wn.2d at 178.

It is pure speculation that a juror might understand *agree* to mean *acquiesce*. The ordinary meaning of the word "agree" is "to concur in (as an opinion)." Webster's Third New International Dictionary 43 (1993). The record must establish more than a "remote or speculative" possibility that an instruction improperly influenced the jury. *Watkins*, 99 Wn.2d at 177. In *Watkins*, for example, a deadlocked and exhausted jury wanted to go home for the weekend. But the judge sent them back with instructions to deliberate until they agreed. And they reached a verdict within a few minutes. *Id.*

Moreover, any deficiency in the unanimity instruction is cured by polling the jury. *Badda*, 63 Wn.2d at 182. And the trial judge did that here.

The jury instructions were adequate.

Sentence

Finally, Mr. Eisenhart seeks review of his standard range sentence.

He was sentenced on an offender score of 12. Two pairs of counts were sentenced as same criminal conduct. Five counts were seriousness level 6 with a standard range of 77-102 months. One count was seriousness level 8 with a standard range of 108-144 months. The court imposed low end sentences on all counts to run concurrently. Mr. Eisenhart contends this is clearly excessive in light of the "multiple offense" policy and former RCW 9.94A.400, now RCW 9.94A.589.[2]

Under the multiple offense doctrine, a sentence is clearly excessive if there is no meaningful difference between the effects of the first criminal act and the cumulative effects of subsequent acts. *State v. Sanchez*, 69 Wn. App. 255, 261, 848 P.2d 208 (1993). We review the trial court's application of the doctrine for abuse of discretion. *State v. McCollum*, 88 Wn. App. 977, 985, 947 P.2d 1235 (1997).

Multiple sentences for repeat deliveries of a controlled substance may be clearly excessive if the sales were initiated and controlled by investigators, involved the same substance, same buyer and same seller, occurred inside a residence, and involved a small

[2] RCW 9.94A.589(1)(a) prescribes that sentences for multiple current offenses are served concurrently. The other current offenses count as prior convictions for the purpose of the offender score, unless the court finds that two or more crimes required the same criminal intent, were committed at the same time and place, and involved the same victim. Those offenses encompass the "same criminal conduct" and count as one crime.

amount of drugs. *Sanchez*, 69 Wn. App. at 261; *State v. Fitch*, 78 Wn. App. 546, 897 P.2d 424 (1995); *State v. Bridges*, 104 Wn. App. 98, 15 P.3d 1047 (2001). The sentencing court has discretion not to apply *Sanchez*, however, if the facts are clearly distinguishable. *McCollum*, 88 Wn. App. at 985.

Mr. Eisenhart contends that the facts here are not distinguishable. The sales were initiated and controlled by investigators, involved the same substance, same buyer and same seller, occurred inside a residence, and involved a small amount of drugs. As in *Sanchez*, he contends, the subsequent buys had no purpose other than to increase the presumptive sentence. *Sanchez*, 69 Wn. App. at 261. The sole difference with *Sanchez*, in Mr. Eisenhart's view, is an immaterial delay between the first and second buys. He contends the investigators did three buys simply out of habit. And, therefore, the sentencing court's failure to consider his *Sanchez* argument was an abuse of discretion. This makes his standard range sentence appealable. *See State v. McGill*, 112 Wn. App. 95, 98-100, 47 P.3d 173 (2002). He asks us to remand with instructions to conduct a *Sanchez* inquiry.

The State points out that, again, the record is silent on this issue. This does not mean the court declined to consider it. All we know is that the court chose a sentence within the standard range. The prosecutor agreed with defense counsel that, under *Sanchez*, counts 1 and 2 as well as 5 and 6 were same criminal conduct. 3RP at 321. The

court accepted this and sentenced accordingly.

The State distinguishes *Sanchez*. Here, Mr. Eisenhart had a prior conviction. Released post conviction, he absconded and then gave a false name to the officer who found him. He feigned illness and other circumstances in an attempt to influence the sentencing court. The judge perceived him as a malingerer. Moreover, the State contends, the sentencing reform act has now been amended to incorporate the multiple offense considerations of *Sanchez*—namely that excessive sentences may result from multiple small drug deliveries. RCW 9.94A.535(1)(g).

We will not review a standard range sentence other than a claim that the sentence exceeds the court's authority. RCW 9.94A.585(1); *State v. Herzog*, 112 Wn.2d 419, 423-32, 771 P.2d 739 (1989). Mr. Eisenhart does not contend his standard range sentence exceeded the authority of the court. We will not, therefore, review his sentence.

We note, moreover, *Sanchez* permits a sentence below the standard range for multiple small drug sales under the circumstances of that case; it does not require a downward departure here. *See Sanchez*, 69 Wn. App. at 262. An exceptional sentence downward is not a matter of right. *State v. Grayson*, 154 Wn.2d 333, 111 P.3d 1183 (2005). The court considered the facts of Mr. Eisenhart's case, treated some counts as same criminal conduct, and imposed concurrent sentences at the low end of the standard range for a total of 108 months, the standard range for the highest level offense. The

court did not abuse its discretion.

We find no error and affirm the judgment and sentence.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Sweeney, C.J.

WE CONCUR:

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Schultheis, J.

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Brown, J.